



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

December 23, 2002

Ms. Maureen E. Ray
Special Assistant Disciplinary Counsel
State Bar of Texas
1414 Colorado
Austin, Texas 78701

OR2002-7375

Dear Ms. Ray:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 174079.

The State Bar of Texas (the "bar") received a written request for six categories of information. You state that the information responsive to request number six has been released to the requestor and that the bar does not possess any records responsive to request numbers two, three, and five.¹ You contend, however, that the information coming within the scope of request number one is excepted from public disclosure pursuant to sections 552.103 and 552.107(1) of the Government Code, and that the information coming within the scope of request number four, a representative sample of which you submitted to this office, is excepted from required disclosure pursuant to section 552.101 of the Government Code.²

You first contend that Exhibit 2, the information sought in request number one, is excepted from public disclosure pursuant to sections 552.103 and 552.107(1) of the Government Code. You describe Exhibit 2 as a communication "between the State Bar management and its staff." To secure the protection of section 552.103 of the Government Code, a governmental body has the burden of providing relevant facts and documents sufficient to

¹The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision No. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation to which the government body is a party was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (1989) at 5 (litigation must be “realistically contemplated”). In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982), and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

In this instance, we conclude that you have not demonstrated that the requestor has taken any concrete steps towards pursuing litigation against the bar. Consequently, the bar may not withhold Exhibit 2 pursuant to section 552.103 of the Government Code.

You also contend that Exhibit 2 is excepted from public disclosure pursuant to section 552.107(1) of the Government Code, which protects information coming within the attorney-client privilege.³ *See generally* Open Records Decision No. 574 (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney’s legal advice and confidential attorney-client communications. *Id.* This office recently refined this position and determined that when a governmental body demonstrates that a communication is protected by the attorney-client privilege as defined by rule 503 of the Texas Rules of Evidence, the entire communication is excepted from disclosure under section 552.107. *See* Open Records Decision No. 676 at 5 (2002). A governmental body that raises section 552.107 bears the burden of explaining how the particular information requested is protected by the attorney-client privilege. *See id.* at 6; *see also Strong v. State*, 773 S.W.2d 543, 552 (Tex. Crim. App. 1989) (burden of establishing attorney-client privilege is on party asserting it).

³Although you also suggest that Exhibit 2 may constitute attorney work product, you have made no argument explaining why such would be the case. Accordingly, we do not consider the applicability of the attorney work product privilege here. *See* Gov’t Code §§ 552.301, .302.

You contend that Exhibit 2 is protected by section 552.107(1) because “[s]hould anticipated litigation ensue, such communications would be provided in confidence to the State Bar’s attorney in furtherance of the attorney’s rendering professional legal services to the State Bar.” This representation indicates to this office that Exhibit 2 in fact has not yet been communicated to the bar’s attorney. Accordingly, we conclude that you failed to meet your burden of establishing that Exhibit 2 consisted of a privileged communication between privileged parties at the time the bar received the current records request. Consequently, the contents of Exhibit 2 may not now be withheld pursuant to section 552.107(1). Because you have not raised an applicable exception for Exhibit 2, this document must be released in its entirety.

You next contend that Exhibit 3, which you submitted to this office as being responsive to request number 4, is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with rule 15.10 of the Texas Rules of Disciplinary Procedure.⁴ We note that the rules of the bar have the same effect as statutes. *See Board of Law Examiners v. Stevens*, 868 S.W.2d 773 (Tex. 1994); *see also State Bar v. Wolfe*, 801 S.W.2d 202, 203 (Tex. App. - Houston [1st Dist.] 1990, no writ); *State Bar v. Edwards*, 646 S.W.2d 543, 544 (Tex.App.--Houston [1st Dist.] 1982, writ ref’d n.r.e.). Section 81.033(a) of the Government Code provides:

All records of the state bar, except for records pertaining to grievances that are confidential under the Texas Rules of Disciplinary Procedure, and records pertaining to the Texas Board of Legal Specialization, are subject to Chapter 552.

Gov’t Code § 81.033(a). Rule 15.10 provides:

All communications, written and oral, and all other materials and statements to or from the Commission, Chief Disciplinary Counsel, the Complainant, the Respondent, and others directly involved in the filing, screening, investigation, and disposition of Inquiries and Complaints are absolutely privileged.

Tex. R. Disciplinary P. 15.10, *reprinted in* Gov’t Code Ann., tit. 2, subtit. G app. A-1. However, rule 2.15 of the Texas Rules of Disciplinary Procedure provides:

All information, proceedings, hearing transcripts, statements, and any other information coming to the attention of the investigatory panel of the

⁴ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by other statutes.

Committee must remain confidential and may not be disclosed to any person or entity (except the Chief Disciplinary Counsel) unless disclosure is ordered by the court. If there is a finding of Just Cause and any Sanction other than a private reprimand (which may include restitution and payment of Attorneys' Fees) imposed by agreement of the Respondent, all of the information, proceedings, hearing transcripts, documents, statements, and other information coming to the attention of the investigatory panel shall be, upon proper request, made public. Notwithstanding anything herein to the contrary, any action taken by a Committee to refer a matter to the Board of Disciplinary Appeals for attorney Disability screening and determination must remain confidential.

Tex. R. Disciplinary P. 2.15.

You state that Exhibit 3 consists of minutes from staff meetings that contain "the names of respondents in whose disciplinary matters no sanction has been agreed to or imposed, and the statuses of those cases." Based on our review of your arguments and the contents of Exhibit 3, we find that rule 2.15 is inapplicable and agree that all of the information you have marked is privileged under rule 15.10. We note that the phrase "absolutely privileged" in rule 15.10 is synonymous with "confidential" in section 81.033. *See, e.g.*, Attorney General Opinion JM-1235 (1990); *see also* Open Records Decision Nos. 384 (1983), 375 (1983). Accordingly, we conclude that the information you have marked in Exhibit 3 is confidential under rule 15.10 of the Texas Rules of Disciplinary Procedure and is, thus, not subject to disclosure under the Public Information Act. *See* Gov't Code § 81.033(a). However, the remaining portions of Exhibit 3, as well as all of Exhibit 2, must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling,

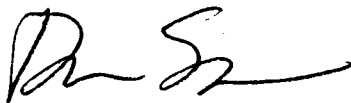
the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/RWP/seg

Ref: ID# 174079

Enc: Submitted documents

c: Mr. Mario E. Gutierrez
12405 Sun Terrace
El Paso, Texas 79938
(w/o enclosures)